

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JONATHAN MCPHEE,

Plaintiff,

v.

SYMPHONY NEW HAMPSHIRE,

Defendant.

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) Civil Action No. 1:18-cv-00322-LM
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DEFENDANT'S PRETRIAL STATEMENT

NOW COMES Defendant Symphony New Hampshire, by and through its attorneys, Primmer Piper Eggleston & Cramer PC, and submits the following Pretrial Statement in accordance with F.R.C.P. 26(a)(3), and Local Rule 16.2:

I. BRIEF STATEMENT OF THE CASE.

Plaintiff and Defendant agree upon the following Statement of the Case except that areas of disagreement (as Defendant understands them) are noted in brackets:

Jonathan McPhee served as Symphony New Hampshire's Music Director from May of 2008 until September 6, 2017. Symphony New Hampshire is a non-profit corporation that has an Executive Director and a Board of Trustees. The Board of Trustees have a Finance Committee and a Governance Committee. Marc Thayer is Symphony New Hampshire's Executive Director and Dr. Robert Oot is President of the Board of Trustees.

Mr. McPhee claims that Symphony New Hampshire terminated his [contract] on September 6, 2017 in retaliation for his raising financial [questions]. He brings legal claims of Wrongful Termination and violation of New Hampshire's Whistleblower Protection Act. Symphony New Hampshire disputes these claims and asserts that it terminated Mr. McPhee's

[contact] because the working relationship between Mr. McPhee and Mr. Thayer and between Mr. McPhee and Dr. Oot had broken down.

In addition, Mr. McPhee claims that Symphony New Hampshire, through Dr. Oot, defamed him in an e-mail to consultant/recruiter Polly Kahn in 2017, and in an e-mail to Symphony New Hampshire trustees, supporters, donors and friends in June 2018. Symphony New Hampshire asserts that the e-mails were not defamatory.

II. LIST OF WITNESSES FOR SNH.

A. Expected Witnesses:

1. Geraldine Boisvert;
2. Ann N. Conway;
3. Jeff Ditman;
4. Karen Duchesne;
5. Mary Jordon;
6. Polly Kahn;
7. Joseph Kenny;
8. Peter Kohler;
9. Cam McGurk;
10. Robert Oot;
11. John Rein;
12. Lauren Spira-Savett;
13. Galina Szakacs;
14. Marc Thayer;
15. Wilberto Torres;

16. Matt Van Wagner;
17. Drew Wilson; and
18. Barbara Young.

B. Witnesses Who May Be Called As Needed:

1. Audrey Alessi;
2. Jolie Blauvelt;
3. Stella Bloom;
4. Bridget Brazeau;
5. Glen Burkhardt;
6. Judy Carlson;
7. Herold Clark;
8. Taylor Clark;
9. Marcia Donaldson;
10. William Drury;
11. Karen Hays;
12. Richard Iannacone;
13. Lenard Johnson;
14. Susan Laughlin;
15. Steve Lavallee;
16. Holly Morales;
17. Richard Raff;
18. Lindsay Rinaldi;
19. Richard Watson;

20. Any and all witnesses identified in Plaintiff's Pretrial Statement;

21. Any person with personal knowledge of any admissible fact discovered by SNH prior to or during trial; and

22. Any witnesses necessary for impeachment or rebuttal purposes.

III. WAIVER OF DEFENSES.

SNH waives no available defenses.

IV. DEPOSITIONS.

SNH reserves the right to read into evidence any deposition taken prior to or during trial, or to show portions of videotaped depositions.

V. EXHIBITS.

SNH expects to offer the following exhibits into evidence at the trial of this matter. SNH reserves the right to amend or supplement this exhibit list:

Exhibit No.	Description
1.	SNH Board of Trustees Meeting Minutes and related documents
2.	Marc Thayer's job description and related documents from Executive Director search
3.	Marc Thayer's Employment Agreement
4.	Jonathan McPhee's Employment Agreement
5.	Jonathan McPhee's Prior Employment Agreement
6.	SNH Financial Statements 2007-2018
7.	SNH Bank Statements 2016-2017
8.	SNH Reconciliations
9.	SNH Season Programs 2016-2019
10.	Text messages between Plaintiff and Amy DeRoche
11.	Strategic Planning Documents

Exhibit No.	Description
12.	August 11, 2016 e-mail (SNH 4053)
13.	Draft Board of Trustee Handbook
14.	August 16, 2016 Board Meeting Minutes (Thayer Ex. 8)
15.	September 20, 2016 Executive Director Report (SNH 539)
16.	September 20, 2016 Board Meeting Minutes (SNH 72)
17.	McPhee Deposition Ex. 6
18.	Oot Deposition Ex. 11
19.	McPhee Deposition Ex. 7
20.	McPhee Deposition Ex. 8
21.	McPhee Deposition Ex. 21
22.	November 7, 2016 e-mail
23.	McPhee Deposition Ex. 9
24.	Oot Deposition Ex. 16
25.	Thayer Deposition Ex. 14
26.	McPhee Deposition Ex. 9
27.	Oot Deposition Ex. 18
28.	Oot Deposition Ex. 20
29.	November 11, 2016 e-mail
30.	Oot Deposition Ex. 21
31.	McPhee Deposition Ex. 13
32.	McPhee Deposition Ex. 15
33.	November 9, 2016 e-mail (McPhee Ex. 10)
34.	Oot Deposition Ex. 19
35.	November 11, 2016 e-mail (SNH 1774)

Exhibit No.	Description
36.	December 8, 2016 e-mail (SNH 1808)
37.	December 12, 2016 e-mail (Thayer 20) and April 17 text
38.	December 13, 2016 e-mail
39.	January 7, 2017 e-mail (SNH 1847)
40.	December 12, 2016 e-mail (Thayer Ex. 20)
41.	Budget vs. Actuals Report July 1, 2016 – January 24, 2017 (SNH 5065)
42.	February 24, 2017 e-mail (SNH 1405)
43.	March 2017 Executive Directors Report to the Board (Kenny Ex. 22)
44.	March 21, 2017 Board Meeting Minutes (McPhee Ex. 30)
45.	March 24 – April 4, 2017 e-mails (Thayer Ex. 23)
46.	April 9, 2017 e-mail (McPhee Ex. 31)
47.	April 13, 2017 e-mail (Thayer Ex. 24)
48.	April 14, 2017 e-mail (Thayer Ex. 26)
49.	April 17, 2017 e-mail from Thayer to Newton/Olson
50.	April 18, 2017 Board Meeting Minutes (Kenny Ex. 25)
51.	April 19, 2017 e-mail (Oot Ex. 25)
52.	April 19, 2017 e-mail (Oot Ex. 26)
53.	April 19, 2017 e-mail (Oot Ex. 27)
54.	April 22, 2017 e-mail (Oot Ex. 28)
55.	May 2-3, 2017 e-mails (Thayer Ex. 31)
56.	May 15, 2017 e-mail (McPhee Ex. 34)
57.	May 15, 2017 e-mail (SNH 1970)
58.	May 18, 2017 e-mail (McPhee Ex. 35)
59.	May 22, 2017 text (McPhee Ex. 36)

Exhibit No.	Description
60.	May 22, 2017 e-mail (McPhee Ex. 37)
61.	May 22, 2017 e-mail (McPhee Ex. 38)
62.	May 22, 2017 e-mail (McPhee Ex. 40)
63.	May 21-23, 2017 texts (DeRoche Ex. 6)
64.	May 24, 2017 text (DeRoche Ex. 7)
65.	May 26, 2017 text (McPhee Ex. 41)
66.	May 26, 2017 text (McPhee Ex. 43)
67.	May 26, 2017 e-mail (McPhee Ex.44)
68.	May 26, 2017 e-mail (McPhee Ex. 42)
69.	May 27, 2017 text (DeRoche Ex. 3)
70.	May 31, 2017 letter from Richard Watson
71.	May 27-28, 2017 e-mails (Spira-Savett Ex. 27)
72.	May 28, 2017 e-mail (Oot Ex. 29)
73.	May 28, 2017 e-mail (Spira-Savett Ex. 37)
74.	May 28, 2017 text (DeRoche Ex. 8)
75.	May 29, 2017 e-mail (Oot Ex. 30)
76.	May 30, 2017 e-mail (Oot Ex. 31)
77.	May 29-30, 2017 e-mails (Oot Ex. 32)
78.	May 30, 2017 e-mail (Spira-Savett Ex. 40)
79.	May 30, 2017 e-mail (McPhee Ex. 18)
80.	May 31, 2017 e-mail (Spira-Savett Ex. 41)
81.	May 31, 2017 text (McPhee Ex. 47)
82.	May 31, 2017 text (DeRoche Ex. 10)
83.	June 1, 2017 e-mail (Spira-Savett Ex. 42)

Exhibit No.	Description
84.	June 1, 2017 text (DeRoche Ex. 11)
85.	June 2-3, 2017 e-mails (Thayer Ex. 33)
86.	June 4, 2017 e-mail (Spira-Savett Ex. 44)
87.	Documents re: Detroit Conference
88.	June 5, 2017 e-mails (Spira-Savett Ex. 45)
89.	June 5, 2017 text (McPhee Ex. 49)
90.	June 6, 2017 e-mail (Spira-Savett Ex. 46)
91.	June 6, 2017 e-mail (McGurk Ex. 3)
92.	June 6, 2017 e-mail (Spira-Savett Ex. 49)
93.	June 6, 2017 text (DeRoche Ex. 12)
94.	June 7, 2017 e-mail (Kenny Ex. 28)
95.	June 7, 2017 e-mail (Spira-Savett Ex. 47)
96.	June 6, 2017 e-mail (Oot to DeRoche)
97.	June 6, 2017 e-mails (Spira-Savett Ex. 48)
98.	June 6, 2017 e-mails (McPhee Ex. 53)
99.	June 7, 2017 e-mail (Spira-Savett Ex. 51)
100.	June 7, 2017 e-mail (McPhee 52)
101.	June 7, 2017 e-mail (Spira-Savett Ex. 52)
102.	E-mail to SNH Board
103.	June 6-7, 2017 e-mails (McPhee Ex. 51)
104.	June 7, 2017 e-mail (Kenny Ex. 28)
105.	June 7, 2017 e-mails (Spira-Savett Ex. 54)
106.	June 7, 2017 text (DeRoche Ex. 14)
107.	June 8, 2017 text (DeRoche Ex. 15)

Exhibit No.	Description
108.	July 8, 2017 text (DeRoche Ex. 21)
109.	June 9, 2017 e-mails (Spira-Savett Ex. 55)
110.	June 14-15, 2017 e-mails (Spira-Savett 56)
111.	June 15, 2017 e-mail (Oot Ex. 43)
112.	June 15, 2017 text (DeRoche Ex. 17)
113.	July 4, 2017 text (DeRoche Ex. 19)
114.	July 6, 2017 text (DeRoche Ex. 20)
115.	July 15, 2017 text (DeRoche Ex. 22)
116.	June 17, 2017 e-mail (Oot Ex. 44)
117.	June 19, 2017 e-mail (Spira-Savett Ex. 59)
118.	June 19, 2017 text (McPhee Ex. 54)
119.	June 13, 2017 e-mail
120.	June 19, 2017 texts (McPhee Ex. 54)
121.	June 19, 2017 e-mail (Thayer to SNH Board)
122.	June 20, 2017 Board of Trustees Report (Thayer Ex. 41)
123.	June 20, 2017 Board Meeting Minutes (Kenny Ex. 29)
124.	June 18, 2016 e-mail (DeRoche to MCPhee)
125.	June 19, 2017 e-mail (DeRoche to MCPhee)
126.	June 19, 2017 e-mail (Spira-Savett Ex. 59)
127.	June 20, 2017 e-mail (Spira-Savett Ex. 60)
128.	June 21, 2017 e-mail (SNH 2363)
129.	June 21, 2017 e-mails (Spira-Savett Ex. 61)
130.	June 27, 2017 e-mail (Spira-Savett Ex. 63)
131.	June 27, 2017 e-mail (Oot Ex. 45)

Exhibit No.	Description
132.	June 28, 2017 e-mail (Spira-Savett Ex. 65)
133.	June 30, 2017 e-mail (Spira-Savett Ex. 66)
134.	July 5, 2017 e-mails (Oot Ex. 46)
135.	July 6, 2017 e-mail (Oot Ex. 47)
136.	July 7, 2017 e-mail (Spira-Savett Ex. 68)
137.	July 7, 2017 e-mail (Spira-Savett Ex. 69)
138.	July 7, 2017 e-mail (Duchesne Ex. 13)
139.	July 8, 2017 e-mail (Duchesne Ex. 15)
140.	July 7, 2017 e-mail (McGurk Ex. 9)
141.	July 9, 2017 e-mail (Kenny Ex. 33)
142.	July 10, 2017 e-mail (Spira-Savett Ex. 71)
143.	July 12, 2017 e-mail (Spira-Savett Ex. 72)
144.	July 13, 2017 e-mail (Spira-Savett Ex. 74)
145.	July 16, 2017 e-mail (Spira-Savett Ex. 75)
146.	July 16, 2017 e-mail (Spira-Savett Ex. 76)
147.	July 17-18, 2017 e-mails (Spira-Savett Ex. 79)
148.	July 18, 2017 e-mail (Spira-Savett Ex. 80)
149.	July 15, 2017 e-mail (Thayer Ex. 45)
150.	July 16, 2017 e-mail (Thayer Ex. 48)
151.	July 19, 2017 e-mail (Spira-Savett Ex. 81)
152.	July 19, 2017 e-mail (Spira-Savett Ex. 82)
153.	July 19, 2017 e-mail (Spira-Savett Ex. 83)
154.	July 19, 2017 e-mail (Thayer Ex. 49)
155.	July 20, 2017 e-mail (Spira-Savett Ex. 84)

Exhibit No.	Description
156.	July 23, 2017 e-mail (Spira-Savett Ex. 87)
157.	July 23, 2017 e-mail (SNH 2652)
158.	July 24, 2017 e-mail (SNH 2657)
159.	July 25, 2017 text
160.	July 24, 2017 text (McPhee Ex. 59)
161.	July 25, 2017 text (DeRoche Ex. 23)
162.	July 26, 2017 e-mail (Spira-Savett Ex. 88)
163.	July 30, 2017 e-mail (Kenny Ex. 35)
164.	July 30-August 1, 2017 e-mails (Spira-Savett Ex. 93)
165.	August 2, 2017 e-mail (Oot Ex. 49)
166.	August 2, 2017 e-mail (McPhee Ex. 57)
167.	August 2, 2017 e-mail (Spira-Savett Ex. 95)
168.	August 2, 2017 e-mail (McGurk Ex. 14)
169.	August 1-3, 2017 e-mails (Spira-Savett Ex. 97)
170.	August 3, 2017 e-mail (Oot Ex. 69)
171.	August 1-3, 2017 e-mails (Spira-Savett Ex. 98)
172.	August 3, 2017 e-mail (SNH 1433)
173.	July 31, 2017 text (DeRoche Ex. 24)
174.	August 9, 2017 e-mail (McGurk Ex. 15)
175.	August 7, 2017 e-mail (Thayer Ex. 52)
176.	August 9-10, 2017 e-mails (Spira-Savett Ex. 103)
177.	August 11, 2017 e-mail (Spira-Savett Ex. 104)
178.	August 11, 2017 e-mail (Thayer Ex. 53)
179.	August 14, 2017 e-mail (Spira-Savett Ex. 105)

Exhibit No.	Description
180.	August 15, 2017 e-mail (Thayer Ex. 55)
181.	August 16, 2017 e-mail (SNH 3222)
182.	August 16, 2017 e-mails (Thayer Ex. 56)
183.	August 16, 2017 e-mail (SNH 3228)
184.	August 16, 2017 e-mail (SNH 1461)
185.	August 17, 2017 e-mail (SNH 1472)
186.	August 17, 2017 e-mail (SNH 1478)
187.	August 17, 2017 text
188.	August 16, 2017 e-mail (Thayer Ex. 57)
189.	August 16, 2017 text (McPhee Ex. 62) (DeRoche Ex. 25)
190.	August 9, 2017 e-mail (SNH 1444)
191.	August 16, 2017 text (McPhee Ex. 62)
192.	August 18, 2017 e-mail (Thayer Ex. 60)
193.	August 19, 2017 e-mail (Spira-Savett Ex. 15)
194.	August 21, 2017 e-mail (McPhee Ex. 61)
195.	August 21, 2017 e-mail (SNH 1487)
196.	August 22, 2017 Board Meeting (McPhee Ex. 19)
197.	August 22, 2017 Board Meeting minutes (Thayer Ex. 61)
198.	August 23, 2017 e-mail (SNH Ex. 3697) (Spira-Savett Ex. 2)
199.	August 23, 2017 e-mail (SNH Ex. 3698-99)
200.	August 23, 2017 e-mail (Oot Ex. 53)
201.	August 23, 2017 e-mail (Spira-Savett Ex. 17)
202.	August 23, 2017 e-mail (Spira-Savett Ex. 18)
203.	August 25, 2017 e-mail (McGurk Ex. 18)

Exhibit No.	Description
204.	August 26, 2017 e-mail (Oot Ex. 54)
205.	August 28, 2017 e-mail (Oot Ex. 74)
206.	August 15, 2017 e-mail (SNH 1454-1460)
207.	August 15-16, 2017 e-mails (SNH 1453-1454)
208.	August 28, 2017 e-mail (Kenny Ex. 52)
209.	August 28, 2017 e-mail (Spira-Savett Ex. 23)
210.	August 29, 2017 e-mail (Kenny Ex. 54)
211.	August 29, 2017 e-mail (Kenny Ex. 55)
212.	August 29, 2017 text
213.	August 30, 2017 e-mail (Oot Ex. 76)
214.	August 30, 2017 text
215.	August 31, 2017 e-mail (Oot Ex. 77)
216.	September 1, 2017 e-mail (SNH 3690-91)
217.	September 2, 2017 e-mail (Van Wagner Ex. 7)
218.	September 3, 2017 e-mail (McGurk Ex. 35)
219.	September 4, 2017 e-mail (McGurk Ex. 37)
220.	September 6, 2017 text (DeRoche 29)
221.	September 6, 2017 Board Minutes (Spira-Savett Ex. 6)
222.	September 6, 2017 Board Minutes (Spira-Savett Ex. 5)
223.	September 6, 2017 e-mail (Thayer Ex. 66)
224.	September 7, 2017 e-mail (McGurk Ex. 40)
225.	September 8, 2017 e-mail (SNH 3535)
226.	September 9, 2017 e-mail (SNH 1653)
227.	September 10, 2017 e-mail (SNH 1655)

Exhibit No.	Description
228.	September 14, 2017 e-mail (McPhee Ex. 25)
229.	September 19, 2017 Board Meeting Minutes (McGurk Ex. 45)
230.	SNH/McPhee Joint Statement

Exhibits to be offered if the need arises:

1. SNH reserves the right to use discovery answers, pleadings and all other documents exchanged in discovery and to use any and all exhibits listed in Plaintiff's Pretrial Statement.
2. SNH reserves the right to use any materials brought to court by any witnesses who appear in court to give testimony and/or present evidence.
3. SNH further reserves the right to utilize demonstrative exhibits, including, but not limited to, illustrations, summaries, charts, models, computer animation, PowerPoint presentations, videotapes, enlargements and/or photographs.
4. SNH preserves all objections and reserves the right to utilize any and all exhibits identified and/or offered by Plaintiff.
5. SNH reserves the right to present rebuttal or impeachment evidence as necessary

VI. JURY EVIDENCE RECORDING SYSTEM (JERS).

The parties have conferred on the use of the Jury Evidence Recording System (JERS) to review evidence. The parties will notify the Court two (2) weeks before trial if they agree to the use of JERS.

VII. SPECIAL DAMAGES.

SNH puts Plaintiff on notice that SNH requires testimonial proof of special damages.

VIII. DEMAND AND OFFER.

The parties engaged in settlement discussions before suit was filed.

IX. ATTORNEYS' FEES.

See Plaintiff's Pretrial Statement.

X. VIEW.

Not applicable.

XI. ESTIMATED LENGTH OF TRIAL.

Eight to ten days.

Respectfully submitted,

SYMPHONY NEW HAMPSHIRE,

By its attorneys,

PRIMMER PIPER EGGLESTON & CRAMER PC,

Dated: September 12, 2019 By: /s/ Thomas J. Pappas, Esq.
Thomas J. Pappas, Esq., (N.H. Bar No. 4111)
Matthew J. Delude, Esq. (N.H. Bar No. 18305)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PRETRIAL STATEMENT has this day been forwarded via the Court's Electronic Case Filing System to Lauren S. Irwin, Esq., Heather M. Burns, Esq. and Brooke Lois Lovett Shilo, Esq.

Dated: September 12, 2019 By: /s/ Thomas J. Pappas
Thomas J. Pappas, Esq., (N.H. Bar No. 4111)